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# The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard

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# THE ESTABLISHMENT CLAUSE AND RELIGIOUS EXPRESSION IN GOVERNMENTAL SETTINGS: FOUR VARIABLES IN SEARCH OF A STANDARD\*

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Daniel O. Conkle\*\*

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## INTRODUCTION

Establishment Clause doctrine is a muddled mess, at least as it relates to religious expression in governmental settings. The *Lemon* and endorsement tests<sup>1</sup> survive in this context, but they hang by a thread, and the Supreme Court's

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\*\* Robert H. McKinney Professor of Law, Nelson Poynter Scholar, and Adjunct Professor of Religious Studies, Indiana University Bloomington. This Essay is based upon a paper that I presented on April 13, 2007, at a conference on "The Religion Clauses in the 21st Century." I am grateful to the West Virginia University College of Law and the American Constitution Society for sponsoring the conference; to Professors John E. Taylor and Vivian E. Hamilton for organizing and hosting such a wonderful event; and to Professor William P. Marshall for his insightful commentary on my paper. I also received helpful comments on my paper from other conference participants, including especially Professors Robert W. Tuttle, Ira C. Lupu, Frederick Mark Gedicks, and Steven D. Smith.

<sup>1</sup> Under the *Lemon* test, a statute (or other governmental action) must satisfy each of three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation omitted). Under the endorsement test, government is forbidden from endorsing or disapproving religion, either purposefully or in effect. The endorsement test was first introduced by Justice O'Connor in her influential concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

changing membership adds to the uncertainty.<sup>2</sup> Various doctrinal alternatives are possible. One approach, considerably more relaxed than existing doctrine—at least for “passive” governmental displays, including Ten Commandments monuments—is suggested by Chief Justice Rehnquist’s plurality opinion in *Van Orden v. Perry*.<sup>3</sup> Justice Scalia would go further, explicitly permitting the government to favor monotheistic religion as such.<sup>4</sup> And Justice Thomas would go even further, releasing the states from the Establishment Clause altogether or, at least, limiting the Clause to legally enforced coercion.<sup>5</sup> But for now, the Court’s general approach continues to preclude the government from promoting religious expression. Even so, the Court has not precluded all religious expression in governmental settings. For example, it has permitted legislative prayer,<sup>6</sup> and it has strongly implied that it would uphold other longstanding governmental invocations of religion, including our national motto, “In God We Trust.”<sup>7</sup> Several Justices likewise have indicated that they would uphold the “one Nation under God” language in the Pledge of Allegiance, even for teacher-led recitations in the public schools.<sup>8</sup> And Justice Breyer, all but throwing up his hands in *Van Orden*, has suggested that close cases in this context require the exercise of “legal judgment,” informed by doctrinal and policy considerations but not controlled by any formal test.<sup>9</sup>

Perhaps Justice Breyer is right. Perhaps, more generally, the search for a clear-cut doctrinal test or rule for religious expression in governmental settings, complete with yes-or-no check-off points, is a mistaken or futile venture. In any event, it is worth considering a very different approach, one that would attempt to capture the full range of relevant constitutional values in this context. This alternative approach would amount to a legal standard, not a rule, and it would be a very general standard indeed, one that would require the Supreme Court to assess and evaluate a number of competing considerations. Even if the Court is not inclined to adopt such a standard, exploring its contours might be fruitful nonetheless, if only to highlight the extent to which formal doctrinal tests or rules might preclude or conceal the consideration of relevant factors.

Anytime the government promotes religious expression, to any degree and whatever the circumstances, it impairs Establishment Clause values. But

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<sup>2</sup> A narrow, five-Justice majority reaffirmed and relied upon elements of both tests in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005). *See id.* at 859-74 (reaffirming and applying *Lemon*’s first prong and using the endorsement test’s “objective observer” or “reasonable observer” to help inform the analysis). Since then, Chief Justice Rehnquist and Justice O’Connor have left the Court, being replaced by Chief Justice Roberts and Justice Alito.

<sup>3</sup> *See Van Orden v. Perry*, 545 U.S. 677, 686-92 (2005) (plurality opinion).

<sup>4</sup> *See McCreary County*, 545 U.S. at 885-900 (Scalia, J., dissenting).

<sup>5</sup> *See Van Orden*, 545 U.S. at 692-98 (Thomas, J., concurring).

<sup>6</sup> *See Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>7</sup> *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1984).

<sup>8</sup> *See infra* Part II.C.2.

<sup>9</sup> *See Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment).

Establishment Clause values are not implicated to the same extent in every case, and competing constitutional values may be relevant as well. These various values, which relate and intersect in complex ways, suggest that at least four variables should inform Establishment Clause decisionmaking in this context.<sup>10</sup> Each variable is linked to one or more relevant constitutional values. And each variable is a matter of degree, not readily subject to categorical, yes-or-no characterizations.

The first variable is that of governmental coercion or aggressiveness, that is, the degree to which the challenged governmental practice not only acknowledges or endorses religion but also “imposes” it in a coercive or otherwise aggressive manner. The second variable is the nature and specificity of the religious expression. Worshipful expression, such as prayer, is more troublesome than non-worshipful statements or affirmations, such as “In God We Trust” or “one Nation under God,” and sectarian expression, such as prayer “in Jesus’ name,” is more problematic than religious expression that is generalized and nonsectarian. Third is the variable of tradition. Tradition—for example, the tradition embodied in the practice of legislative prayer—helps inform the meaning of the Establishment Clause, sometimes acting as a counterweight to other constitutional values. The deeper the tradition, the stronger the argument for its preservation even in the face of competing considerations. The fourth and final variable is the degree to which the religious expression is governmentally—as opposed to privately—crafted or sponsored. The Establishment Clause forbids the government from improperly promoting religion, but the Free Speech Clause protects the expression of religious individuals and groups. The distinction between governmentally sponsored and privately sponsored religious expression is not always clear. Sometimes, like the other variables, it is a matter of degree.

A legal standard incorporating these four variables might help explain the Supreme Court’s existing pattern of decisions, including its well-settled positions in certain areas and its uncertainty and struggles in others. It also could help inform new interpretations of the Establishment Clause—either stricter interpretations than those currently prevailing, or, perhaps more likely, new interpretations that are more relaxed. Under this type of open-ended and multi-variable approach, the Supreme Court’s decisions would depend upon Breyer-esque “legal judgment,” a methodology giving the Justices broad leeway in the assessment and weighing of competing constitutional values and variables.<sup>11</sup>

In this Essay, I first will identify the Establishment Clause and other constitutional values that are at work in the context of religious expression in governmental settings, and I will explain how the four variables I have noted relate to these values. I then will apply the resulting legal standard to three sets

<sup>10</sup> In some cases there might be additional relevant variables, beyond these four. See *infra* notes 126-130 and accompanying text.

<sup>11</sup> This approach, in effect, would call for a form of casuistical reasoning. For an elaboration and defense of casuistry (properly understood), see ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

of cases: easy cases, focusing especially on school prayer and equal access claims; not-so-easy cases, also relating to school prayer and equal access; and hard cases, focusing on the Ten Commandments dispute in *Van Orden* and the unresolved Pledge of Allegiance controversy. In analyzing the cases within each group, I will attempt to explain, with reference to the four variables, why the cases are easy, not so easy, or hard. I will end the Essay with some concluding observations.

## I. VALUES AND VARIABLES

### A. *Constitutional Values*

The Establishment Clause of the First Amendment is informed by various constitutional values—values that have emerged and evolved over the course of American history.<sup>12</sup> In the context of religious expression in governmental settings, at least six Establishment Clause values are pertinent. Also relevant is a seventh constitutional value, one linked primarily to the Free Speech Clause.<sup>13</sup> Some of these seven values are complementary, but some are in tension.

The first and most fundamental value under the Establishment Clause (and under the Religion Clauses generally, including the Free Exercise Clause) is the value of religious voluntarism. Religious voluntarism is religious liberty in its most basic sense, that is, the freedom of individuals to make religious or irreligious choices for themselves, free from governmental compulsion or improper influence. Standing alone and given vigorous protection, this value would require that government “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance,” leaving religion “as wholly to private choice as anything can be.”<sup>14</sup>

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<sup>12</sup> The Religion Clauses of the First Amendment not only prohibit the “establishment of religion” but also protect “the free exercise thereof.” U.S. CONST. amend. I. And some of the constitutional values that inform the Establishment Clause more broadly inform the Religion Clauses generally. See DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 28-48 (2003) (recounting the origin, development, and substance of constitutional values that can be seen to inform the Establishment and Free Exercise Clauses alike); see also Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004) (agreeing that the Religion Clauses serve multiple values and offering a sophisticated account of the values underlying each clause).

<sup>13</sup> U.S. CONST. amend. I (protecting “the freedom of speech”).

<sup>14</sup> Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-02 (1990); see Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007) (revisiting and defending substantive neutrality as a vehicle for protecting religious voluntarism); cf. Carl H. Esbeck, *A Restatement of the Supreme Court’s Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 626 (1995) (defining voluntarism as “freedom from active governmental involvement in religious affairs”).

Second, and more broadly, the Establishment Clause instructs the government to respect the religious identity of its citizens, including religious minorities and nonbelievers. The Clause thus embodies the value of religious respect. An individual's religious identity—whether it affirms a particular religion or rejects religion altogether—often is central to his or her self-understanding. If the government fails to respect an individual's religious identity, the government's action, even if non-coercive and purely symbolic, may assault the person's sense of self, causing offense, affront, and embarrassment. The value of respect suggests that the government generally should avoid the promotion of religious perspectives not shared by all, because such action is likely to insult and denigrate those who find their beliefs and self-understandings excluded.<sup>15</sup>

Third, and relatedly, the Establishment Clause fosters a religiously inclusive political community. The Clause thus honors the value of religious inclusiveness, which is a structural, political value. Like the value of respect, the value of inclusiveness counsels against governmental action that promotes religious perspectives. Historically, governments with formal religious establishments "had incurred the hatred, disrespect and even contempt of those who held contrary beliefs," tending "to enervate the laws in general, and to slacken the bands of Society."<sup>16</sup> More broadly, as Justice O'Connor has explained, whenever the government promotes or endorses a religious perspective, it "sends a message to nonadherents that they are outsiders, not full members of the political community."<sup>17</sup> Such a message of exclusion may cause not only offense, affront, and embarrassment, but also disaffection and alienation, threatening the unity of the political community itself.<sup>18</sup>

Fourth, the Establishment Clause serves another structural value, protecting religion from government. This value—the value of religious independence—affirms the role of religion as an autonomous force, a force that should be free from ill-informed and ill-advised governmental intermeddling. When the government chooses to promote a religious perspective, its objective is to support religion. In reality, however, the government lacks the competence to resolve contested religious questions, and its attempts to do so—its picking and choosing of preferred religious positions—may have a corrosive effect, hindering the flourishing, development, and competition of religious ideas in the pri-

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<sup>15</sup> See Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164-66, 1172-76 (1988). But cf. William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351 (1991) (arguing that offense to religious sensibilities, without more, is an inadequate basis for constitutional invalidation).

<sup>16</sup> *Engel v. Vitale*, 370 U.S. 421, 431 & n.13 (1962) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), reprinted in 5 THE FOUNDERS' CONSTITUTION 82, 84 (Philip B. Kurland & Ralph Lerner eds., 1987)).

<sup>17</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>18</sup> See Conkle, *supra* note 15, at 1166-69, 1176-79.

vate sphere. Once again, this value suggests that the government generally should not act in this fashion.

Fifth is the value of religious equality, which can be seen to reflect, in part, a more general commitment to equality as a basic constitutional value in the United States.<sup>19</sup> At a minimum, the value of religious equality strongly disfavors sectarian discrimination, meaning governmental action that favors one specific religion, such as Christianity, over competing religious views. More broadly, the value of religious equality can be understood to disfavor nonsectarian discrimination as well, that is, governmental action favoring religion in general over irreligion.<sup>20</sup> According to the Supreme Court, sectarian discrimination violates "[t]he clearest command of the Establishment Clause,"<sup>21</sup> and there is little disagreement among the Justices on this point.<sup>22</sup> By contrast, some Justices contest the proposition that the Establishment Clause disfavors nonsectarian discrimination favoring religion in general, and, as a matter of existing doctrine, it appears that any such disfavoring is qualified, not absolute. Justice Scalia, for example, has suggested that the value of religious equality should not be understood to prevent the government from symbolically favoring religion over irreligion, even if such favoritism entails a preference for monotheistic religion.<sup>23</sup> Whatever the merits of Scalia's position,<sup>24</sup> it seems clear that nonsec-

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<sup>19</sup> Like equality generally, religious equality is a consensus value in the United States. But as with equality generally, the meaning of religious equality is deeply contested. Indeed, as Professor Robin Charlow has explained, the full meaning of religious equality cannot be determined without resolving a series of difficult analytical, doctrinal, and theoretical problems. See Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529 (2005).

<sup>20</sup> See generally William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 196 (2000) (arguing that the Supreme Court's decisionmaking under the Religion Clauses has been strongly influenced, and properly so, "by a general notion of equality—both equality between religions and between religion and nonreligion").

<sup>21</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982).

<sup>22</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (agreeing that the government is precluded "from asserting a preference for one religious denomination or sect over others"); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (agreeing that the Establishment Clause "rule[s] out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian").

<sup>23</sup> See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 885-900 (2005) (Scalia, J., dissenting). Justice Scalia contends that symbolic favoritism of this sort is a longstanding tradition in the United States and that, as such, it cannot be said to violate the Establishment Clause. See *id.* This reasoning is consistent with Scalia's general approach to constitutional interpretation, which typically uses tradition not to invalidate nontraditional practices but to protect traditional ones from constitutional attack. See Kyle Duncan, *Bringing Scalia's Decalogue Dissent Down from the Mountain*, 2007 UTAH L. REV. 287.

<sup>24</sup> Compare Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097 (2006) (rejecting Scalia's position as radical and indefensible), with Michael J. Perry, *What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 U. ST. THOMAS L.J. 549, 573-74 (2003) (defending a position comparable to

tarian discrimination sometimes is permissible, including, for example, the favoring of religion over irreligion in our national motto, "In God We Trust."<sup>25</sup>

Sixth, the Establishment Clause is properly informed by history and therefore by tradition.<sup>26</sup> As the Supreme Court has noted, "We are a religious people whose institutions presuppose a Supreme Being."<sup>27</sup> More specifically, our religious heritage and character are embodied in various traditional practices—including our national motto—through which the government acknowledges or endorses religion in ways that might be unconstitutional except for the weight of tradition. The practice of legislative prayer by a paid legislative chaplain, for example, might seem a quintessential violation of the Establishment Clause, but the Supreme Court has upheld it in a decision emphasizing that legislative prayer is such a longstanding American tradition that it is "part of the fabric of our society."<sup>28</sup>

Tradition is a constitutional value in its own right, but it also can act to mitigate the adverse effect of a governmental practice on other Establishment Clause values, including the twin values of religious respect and inclusiveness. As compared to a similar practice of more recent vintage, a traditional practice acknowledging or endorsing religion may be less offensive to dissenting citizens. The dissenters may be more inclined to accept or tolerate the tradition as a product of history and therefore part of a preexisting status quo, rather than a contemporary governmental statement of disrespect signaling their symbolic

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Scalia's, according to which the Establishment Clause would permit the government "to affirm any religious premise (or premises) that is nonsectarian as among the great monotheistic faiths—Judaism, Christianity, and Islam"). Cf. Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 727 (2003) ("We have evolved [from a Christian country] into a country that is officially monotheistic.").

Even if Scalia is correct in substance, one might argue that the Court's approval of this religious favoritism should not be so openly and starkly recognized. See Laura S. Underkuffler, *Through a Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST AMEND. L. REV. 59, 63 (2006) (arguing that Scalia-style transparency in this context, giving explicit approval to governmental actions promoting religion and monotheism as such, carries "dangers and hidden costs that we, as a religiously pluralistic society, should not wish to pay").

As Professor Steven D. Smith has explained, a categorical prohibition on nonsectarian discrimination would be difficult to defend. Instead, based on tradition, political viability, and candor, Smith argues that the government should be free to act upon religion or engage in religious expression as long as the action or expression is not "unnecessarily or gratuitously narrow or exclusionary." Steven D. Smith, *Nonestablishment "Under God"? The Nonsectarian Principle*, 50 VILL. L. REV. 1, 17 (2005); see *id.* at 8-17. But cf. Underkuffler, *supra* note 24 (arguing that the Court should not explicitly permit the government to favor religion on a general or nonsectarian basis even if the Establishment Clause might implicitly permit the government sometimes to act in this fashion).

<sup>26</sup> To say that the Establishment Clause is properly informed by tradition, as one constitutional value among others, is not to accept the position of Justice Scalia, who would give this value dominant if not controlling significance. See *supra* note 23.

<sup>27</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

<sup>28</sup> *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).



exclusion from the political community. At the same time, for the Supreme Court to invalidate the traditional practice might cause more harm to political cohesiveness than it would eliminate, because the invalidation might have a powerfully exclusionary effect on a large majority of citizens, those whose religious sentiments the tradition honors and who might feel deeply attached to the practice as a time-honored feature of the American heritage.<sup>29</sup>

Finally, the seventh relevant value is freedom of religious speech as a form of expressive and religious liberty. This constitutional value is derived in part from the Free Exercise Clause, but it is grounded mainly in the Free Speech Clause. At least in the absence of governmental sponsorship, religious speech, including prayer and worship, is high-value speech under the Free Speech Clause, no less than core political speech.<sup>30</sup> As a result, it is strongly protected from censorship or discriminatory treatment at the hands of government (including the judiciary), even when the speech occurs in the public schools or in other governmental settings. The Free Speech Clause thereby protects not only the constitutional value of expressive liberty in general, but also the value of religious liberty in the realm of privately sponsored religious expression.<sup>31</sup> When religious expression takes place in governmental settings, however, the expression may be the combined product of private and governmental action, complicating the issue of sponsorship and potentially putting the value of religious free speech in tension with competing Establishment Clause values.

## B. *Constitutional Variables*

Religious expression in governmental settings takes numerous forms and occurs in a variety of circumstances. Each situation can be evaluated with

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<sup>29</sup> See Conkle, *supra* note 15, at 1183-87.

Frederick Mark Gedicks and Roger Hendrix contend that contemporary governmental invocations of religion, even when couched in nonsectarian terms, increasingly reflect an implicit sectarianism—that of conservative Christianity. See Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 289-304 (2007). If so, this may provide an additional reason to favor older, more traditional practices, because the value of religious equality may be differentially affected. In particular, if traditional practices acknowledging or endorsing religion are less likely to carry a covert sectarian message, they are, to that extent, less threatening to the core meaning of religious equality, which strongly disfavors sectarian discrimination.

<sup>30</sup> See e.g., *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

<sup>31</sup> This value is similar in some respects to the Establishment Clause value of religious independence, but the values are not the same. Religious independence protects religion from government; it is a structural value protecting religion as an independent force in society, and it guards against governmental intermeddling through ill-conceived and ill-advised governmental sponsorship. The value of religious free speech, by contrast, is not a structural value. Rather, it protects an interest in individual liberty, an interest that is implicated when governmental (including judicial) action censors or discriminates against religious expression that is privately as opposed to governmentally sponsored.

reference to the seven constitutional values I have discussed, but these values do not always point in a single direction, and, indeed, they sometimes intersect in complex ways. It is difficult to imagine how any clear-cut doctrinal test or rule could give these values their due. Rather, giving them full consideration would seem to require a Breyer-esque legal standard. Properly understood, such a standard would not be entirely open-ended, but instead would be guided by an analysis of the four constitutional variables identified at the outset of this Essay, which I will now elaborate. As I will explain, these four variables are closely linked to the seven values I have catalogued.

The first variable, governmental coercion or aggressiveness, measures the degree to which the challenged governmental practice not only acknowledges or endorses religion but also “imposes” it in a coercive or otherwise aggressive manner.<sup>32</sup> This variable is linked directly to the first and most basic Establishment Clause value, religious voluntarism. Needless to say, safeguarding the freedom of individuals to make religious or irreligious choices is fundamental. As a result, any significant degree of coercion is unacceptable. Beyond that, two additional Establishment Clause values are at stake—respecting the religious identity of dissenting citizens and, relatedly, promoting a religiously inclusive political community. Anytime the government promotes religious views that dissenting citizens do not share, it impairs these twin values of respect and inclusiveness, denigrating the dissenters and relegating them to the status of “outsiders.” But the impairment varies with the aggressiveness of the challenged governmental practice. And aggressiveness, like coercion, is a matter of degree. The more aggressively the government acts, the greater the injury to these values.

The second variable, concerning the nature and specificity of the religious expression in question, implicates a number of Establishment Clause values. Like the first variable, it is linked in part to the values of religious voluntarism, respect, and inclusiveness. For example, if the religious expression amounts to religious worship, even the most indirect and subtle governmental influence may be impermissibly coercive, because religious voluntarism is especially important when compulsory worship is at stake. And even in the absence of coercion, public acts of worship, including prayer, ritual, or adoration, are more offensive, threatening, and exclusionary to dissenting citizens than are non-worshipful religious statements or affirmations, such as “In God We Trust” or “one Nation under God.” Likewise, sectarian expression, whether in acts of worship or otherwise—expression affirming the divinity of Christ, for example—is likely to generate greater affront and disaffection than nonsectarian, generalized religious expression. To be sure, even a non-worshipful and generalized religious affirmation excludes some citizens, signaling disrespect and jeopardizing their attachment to the political community. At the same time,

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<sup>32</sup> Cf. *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion) (“Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens.”).

however, such a generalized affirmation might encompass the great majority of citizens, enhancing their connection to the political community and offsetting (although certainly not eliminating) the exclusionary effect on dissenters. In any event, religious expression in governmental settings is more troublesome when it is worshipful as opposed to non-worshipful and more troublesome when it is specific than when it is general.

This second variable, including especially its sectarian-nonsectarian dimension, also implicates two other Establishment Clause values: religious equality and religious independence. A generalized religious affirmation does not honor the value of religious equality in its fullest sense, but, if sufficiently general and nonsectarian, it may honor the core requirement of equality between and among religions. Likewise, the problems of governmental incompetence and intermeddling are reduced—albeit not eliminated—to the extent that religious affirmations are generalized statements that avoid contentious theological controversies. Once again, these values suggest that governmental religious affirmations are more troublesome to the extent that they are specific rather than general.

The third variable, tradition, is linked to a single constitutional value, that of preserving traditional governmental practices even when those practices might tend to impair other Establishment Clause values. This factor is relevant only when the challenged governmental practice is traditional in a historical sense. It is a variable because some traditions are more deeply embedded than others, based primarily on their length but also on their prominence—both historically and today—as important features of the American political and cultural landscape. The deeper the tradition, the stronger the argument for its preservation even in the face of competing constitutional considerations.

The fourth and final variable measures the degree to which the religious expression is governmentally—as opposed to privately—crafted or sponsored. The Establishment Clause forbids the government from improperly promoting religion. Conversely, the Free Speech Clause strongly protects religious expression by individuals and organizations; it protects the value of religious free speech as a form of expressive and religious liberty. This fourth variable captures and mediates these competing constitutional concerns. The values of the Establishment Clause, including religious voluntarism, respect, inclusiveness, and equality, limit the government's power to craft or sponsor religious expression, whereas the value of religious free speech limits the government (including the judiciary) in a different way. It protects against governmental censorship or discriminatory treatment of private religious expression, even if this private expression might threaten religious voluntarism, respect, inclusiveness, or equality. Sometimes the crafting or sponsorship of religious expression in governmental settings is mixed, with the expression including elements of private speech as well as governmental sanction. The greater the governmental involvement, the greater the potential injury to Establishment Clause values. The greater the private involvement, by contrast, the greater the risk to religious free speech.

Taken together, these four variables suggest that the Establishment Clause prohibition on governmentally sponsored religious expression is not clear-cut, but instead is subtle and complicated. Factors pointing toward an Establishment Clause violation are coercion or aggressiveness; worshipful or sectarian religious expression; the absence of tradition; and clear governmental responsibility. Conversely, factors favoring validation are the relative absence of coercion or aggressiveness; non-worshipful and generalized religious expression; the support of tradition; and significant private involvement in the crafting and sponsorship of the religious expression. The result is a complex and multifaceted continuum.

## II. APPLICATIONS

### A. *Easy Cases*

One can imagine hypothetical cases falling near the endpoints of the continuum. Near one end might be a system of compulsory worship, narrowly sectarian in nature, with the government prescribing the prayers and rituals by statute and requiring all citizens to actively participate, on pain of criminal sanction. Near the other end might be a privately organized, voluntary assembly of religious adults of various faiths, gathered on governmental property broadly open to the public, such as a public park, not to worship or pray but simply to affirm their general, nonsectarian belief in the power of religion. The religious expression in the first example is directly coerced, worshipful and sectarian, lacking any sort of tradition-based support, and entirely crafted and sponsored by the government, not private actors. The second example concerns religious expression that is utterly voluntary, non-worshipful and nonsectarian, privately crafted and sponsored, and (precisely because of its private dimension) supported by a deeply embedded tradition, a tradition strongly protecting freedom of speech—including religious speech—in public settings such as this.

In the real world of the Supreme Court's Establishment Clause decisionmaking, the cases are less extreme, but there are easy cases nonetheless. Consider, for example, *Engel v. Vitale*<sup>33</sup> and *School District of Abington Township v. Schempp*.<sup>34</sup> In these cases, the Supreme Court invalidated teacher-led group prayer and other devotional exercises in public school classrooms. Although students were not formally required to participate, there plainly was a significant degree of coercion. School attendance was compulsory, and the students were impressionable children, readily influenced by their teachers and by the powerful weight of peer pressure in the classroom setting.<sup>35</sup> In each case,

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<sup>33</sup> 370 U.S. 421 (1962).

<sup>34</sup> 374 U.S. 203 (1963).

<sup>35</sup> See *id.* at 289-92 (Brennan, J., concurring) (noting that despite their formal right to be excused from religious exercises, dissenting students faced obvious pressure to participate in order to avoid being viewed by their teachers and peers as nonbelievers or nonconformists); cf. *Engel*,

worshipful expression was at issue, and, at least in *Schempp*, the prayer—the Lord’s Prayer—was distinctly sectarian in nature.<sup>36</sup> In *Engel*, the prayer was composed and prescribed by a government agency.<sup>37</sup> In *Schempp*, the prayer and devotional readings were drawn from the Bible, but the religious exercises in *Schempp*, as in *Engel*, undeniably were sponsored and orchestrated by the government, acting through the public schools. School-sponsored prayer and religious exercises of this sort may have been traditional practices prior to *Engel* and *Schempp*,<sup>38</sup> but the other three constitutional variables pointed clearly and strongly toward invalidation. The governmental action was not only aggressive but coercive to a significant degree; the religious expression was worshipful and (at least in *Schempp*) sectarian in nature; and the government was clearly responsible for the expression, there being no significant element of private sponsorship. These were easy cases, and the Justices were all but unanimous in finding Establishment Clause violations.<sup>39</sup>

Easy cases in the opposite direction can be drawn from the Supreme Court’s equal access decisions. In *Widmar v. Vincent*,<sup>40</sup> for instance, the Court ruled that the Establishment Clause does not forbid student groups at state universities from using university facilities for religious worship and discussion, as long as the facilities are neutrally allocated to religious and non-religious groups alike. Likewise, in *Lamb’s Chapel v. Center Moriches Union Free School District*,<sup>41</sup> the Court ruled that a public school district, having opened its facilities for after-hours use by various community groups, properly could extend the same access to a religious group for a film series promoting Christian family values. In each case, the Court was unanimous or nearly unanimous,<sup>42</sup> and in each case, it found that equal access for the religious expression was not only permitted by the Establishment Clause but affirmatively required by the Free

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370 U.S. at 430-31 (stating that an Establishment Clause claim “does not depend upon any showing of direct governmental compulsion,” but suggesting that the Clause helps guard against “indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion”).

<sup>36</sup> See *Schempp*, 374 U.S. at 207; *id.* at 267 (Brennan, J., concurring) (noting that, as compared to the “rather bland” prayer at issue in *Engel*, the Lord’s Prayer and devotional Bible readings in *Schempp* were, “if anything, . . . more clearly sectarian,” making the Establishment Clause violations “consequently more serious”).

<sup>37</sup> See *Engel*, 370 U.S. at 422-23; *cf. id.* at 425 (“[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”).

<sup>38</sup> See *Schempp*, 374 U.S. at 267-78 (Brennan, J., concurring) (discussing the long but somewhat complex and controversial history of these practices).

<sup>39</sup> Justice Stewart was the sole dissenter in each case.

<sup>40</sup> 454 U.S. 263 (1981).

<sup>41</sup> 508 U.S. 384 (1993).

<sup>42</sup> *Widmar* was an eight-to-one decision, with Justice White dissenting. In *Lamb’s Chapel*, the result was unanimous, and, notably, Justice White himself wrote the majority opinion.

Speech Clause.<sup>43</sup> These were easy cases because, at least in settings such as these, a governmental policy granting equal access is neither coercive nor aggressive, and, indeed, such a policy does nothing more than facilitate, on a neutral basis, religious expression that is fundamentally the product of private action. Because the government's role and responsibility are minimal, the religious expression may be worshipful and sectarian, and there is no need to find tradition-based support for the government's limited involvement. There simply is no serious threat to Establishment Clause values, leaving the value of religious free speech dominant and controlling.

### B. Not-So-Easy Cases

Not-so-easy cases under the multivariable standard I am exploring might be easy cases under the Supreme Court's prevailing constitutional doctrine, and, in highlighting some examples in the discussion that follows, I do not mean to imply that the Court's decisions have been mistaken. (In fact, I generally agree with the Court's decisions.) What I do mean to suggest is that relatively speaking, cases become progressively less easy and more difficult when the variables I have noted do not point strongly in a single direction.

Some of the Court's school prayer decisions, for instance, have found Establishment Clause violations in situations less clear-cut than *Engel* and *Schempp*. In its six-to-three decision in *Wallace v. Jaffree*,<sup>44</sup> for example, the Court invalidated an Alabama statute calling for teachers to lead a daily moment of classroom silence "for meditation or voluntary prayer."<sup>45</sup> The majority emphasized the statute's peculiar legislative history, arguing that it revealed an unusually flagrant—and gratuitous—official promotion of religion, in part because a preexisting statute had already authorized a period of silence for "meditation."<sup>46</sup> The majority implied that moment-of-silence laws generally were permissible if they did not mention prayer as such.<sup>47</sup> Taking into account the five concurring and dissenting opinions, moreover, a majority of the Justices went further, suggesting that they would approve laws with more neutral legislative histories even if the laws did mention prayer as a permissible use of the silent period.<sup>48</sup>

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<sup>43</sup> *Widmar*, 454 U.S. at 276; *Lamb's Chapel*, 508 U.S. at 394.

<sup>44</sup> 472 U.S. 38 (1985).

<sup>45</sup> *Id.* at 40, 61.

<sup>46</sup> *See id.* at 56-61.

<sup>47</sup> The preexisting Alabama statute, authorizing silent "meditation," was not challenged in the Supreme Court. *See id.* at 40 n.1, 41. Moreover, the Court's analysis of the legislature's additional provision for silent "prayer" clearly assumed that the preexisting statute was not unconstitutional. *See id.* at 56-61.

<sup>48</sup> The three dissenters, of course, would have upheld even the challenged Alabama law. *See id.* at 84-90 (Burger, C.J., dissenting); *id.* at 90-91 (White, J., dissenting); *id.* at 113-14 (Rehnquist, J., dissenting). Justices Powell and O'Connor, by contrast, agreed that the Alabama

Under the analysis I am considering, the Court's apparent approval of most moment-of-silence laws is not surprising, nor is it surprising that three Justices dissented even in *Wallace* itself. To be sure, a teacher-enforced moment of silence directly coerces school children, but the enforced behavior is silence, not religious expression, much less worshipful expression. Students may—or may not—choose to use the period for individual silent prayer. If their teacher or peers appear to be praying, they might be influenced to do likewise. To this extent, the teacher-declared moment of silence might tend to influence students toward worshipful behavior. As long as the teacher does not improperly encourage prayer when announcing the silent period, however, the governmental action is not particularly aggressive, and the risk of coerced worship—certainly as compared to the risk in *Engel* or *Schempp*—is relatively low. Any governmental promotion of religion, moreover, plainly is not sectarian, and any silent prayers that occur are composed by individuals and therefore are the product mainly of private rather than governmental action. As compared to the spoken group exercises in *Engel* and *Schempp*, classroom moments of silence are less aggressive and coercive in promoting religious expression; are less likely to promote worshipful expression or particular sectarian views; and concern religious expression that is much more a matter of private rather than governmental responsibility. These are significant differences under the multivariable approach, making moment-of-silence cases not so easy to decide.

Another not-so-easy case finding an Establishment Clause violation is the Court's five-to-four decision in *Lee v. Weisman*.<sup>49</sup> In *Weisman*, the Court ruled that public school graduation ceremonies cannot include prayers by invited clergy.<sup>50</sup> But the practice of graduation prayer, as exemplified and discussed in *Weisman*, is different in important respects from religious exercises of the sort at issue in *Engel* and *Schempp*.

Indeed, there are potential differences in each of the four variables I have identified. First, graduation prayer is less aggressive and coercive than daily classroom prayer.<sup>51</sup> It occurs infrequently and outside the setting of formally compulsory attendance.<sup>52</sup> Unlike the active student participation in *Engel* and *Schempp*, moreover, the graduating students and others in attendance are invited to participate only by remaining silent, or perhaps by standing. They are not asked, for example, to join orally in a collective "Amen."<sup>53</sup> Second, at least

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law was unconstitutional because of its unique legislative history, but they indicated that other moment-of-silence laws would properly be upheld. See *id.* at 65-67 (Powell, J., concurring); *id.* at 70-79 (O'Connor, J., concurring in judgment).

<sup>49</sup> 505 U.S. 577 (1992).

<sup>50</sup> *Id.* at 580, 599.

<sup>51</sup> This is not to deny that graduation prayer itself gives rise to a significant degree of indirect coercion. See *id.* 592-99.

<sup>52</sup> See *id.* at 643-44 (Scalia, J., dissenting).

<sup>53</sup> See *id.* at 593 (majority opinion).

in *Weisman*, the prayers were worshipful but not sectarian,<sup>54</sup> distinguishing the case from *Schempp* if not from *Engel*. Third, the practice of nonsectarian graduation prayer arguably is supported by a longstanding tradition that is part of a broader tradition of nonsectarian prayer at public ceremonies generally.<sup>55</sup> Finally, even though the government—through the public schools—is substantially involved, so is the private individual who offers the prayers. In *Weisman*, for example, school officials elected to have the prayers, chose the person to deliver them, and asked that they be nonsectarian, but the prayers were then crafted and delivered by a private individual, a rabbi, creating a greater element of private involvement than in *Engel* and *Schempp*.<sup>56</sup> Again, I do not mean to suggest that *Weisman* was wrongly decided.<sup>57</sup> Instead, I am contending only that the case is not as easy as *Engel* and *Schempp*.<sup>58</sup>

In the equal access context likewise, some cases are not as easy as others. As discussed earlier, *Widmar* and *Lamb's Chapel* were easy cases rejecting Establishment Clause challenges because the equal access policies in question—concerning meeting space for college students and community groups respectively—merely facilitated private religious expression. In the circumstances at hand, the government's responsibility for the expression was minimal, allowing free speech values to dominate and Establishment Clause concerns to largely disappear.<sup>59</sup> Equal access cases become less easy when contextual considerations suggest a greater symbolic link between the government and the religious expression, shifting the relative mix of private and governmental responsibility. When this occurs, Establishment Clause values may return to view, implicating additional constitutional variables, including aggressiveness and coercion as well as the nature and specificity of the religious expression.

Consider, for instance, the Supreme Court's seven-to-two decision in *Capitol Square Review and Advisory Board v. Pinette*.<sup>60</sup> Applying equal access principles, the Court ruled that a privately erected Latin cross, freestanding and unattended, could be placed in front of the Ohio State Capitol and that, indeed, the Free Speech Clause affirmatively guaranteed the right to place the cross in this location.<sup>61</sup> Speaking through separate opinions, five Justices affirmed the

<sup>54</sup> See *id.* at 581-82.

<sup>55</sup> See *id.* at 631-36 (Scalia, J., dissenting).

<sup>56</sup> See *id.* at 587-88 (majority opinion); *id.* at 639-40 (Scalia, J., dissenting).

<sup>57</sup> Indeed, I have written favorably of the Court's decision. See Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993).

<sup>58</sup> Another case that is not so easy for similar reasons is *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In *Doe*, a six-to-three majority, extending *Weisman*, invalidated a school board policy that called for student votes to determine whether there would be student-led "invocation[s] and/or message[s]" before high school football games. *Id.* at 298 & n.6; see *id.* at 301-17.

<sup>59</sup> See *supra* text accompanying notes 40-43.

<sup>60</sup> 515 U.S. 753 (1995).

<sup>61</sup> *Id.* at 761-63.



need for a context-specific inquiry, reasoning that the Establishment Clause would have precluded equal access if a reasonable observer would have concluded that the government was endorsing the religious message.<sup>62</sup> The two dissenters in *Capitol Square* went further, finding an Establishment Clause violation in the case at hand, in part because the display was so close to the seat of government.<sup>63</sup>

Certainly as compared to *Widmar* and *Lamb's Chapel*, *Capitol Square* presented a far stronger symbolic link between the religious expression and the government, thereby generating a much stronger perception of governmental as opposed to purely private sponsorship. Moreover, again by comparison to *Widmar* and *Lamb's Chapel*, the religious expression in *Capitol Square* was far more aggressive and confrontational. In *Widmar* and *Lamb's Chapel*, the expression took place in meetings attended only by those who welcomed the expression by choosing to attend. In *Capitol Square*, by contrast, the expression took the form of a prominent and powerful public display, emanating from the symbolic center of Ohio's political community and readily visible to passing motorists and pedestrians. The cross directly confronted the citizenry at large, including religious minorities and nonbelievers. As Justice Stevens noted in his dissenting opinion, the religious meetings in *Widmar* and *Lamb's Chapel* "were simply less obtrusive, and less likely to send a message of [state] endorsement, than the eye-catching symbolism at issue in this case."<sup>64</sup> Beyond that, the expression was distinctly sectarian, a potent and well-recognized symbol of Christianity.<sup>65</sup> This case was not so easy because the religious expression was sectarian and at least relatively aggressive and because the government, by providing equal access in this particular setting, was providing symbolic support that went beyond the mere facilitation of private expression.

Another example is *Good News Club v. Milford Central School*.<sup>66</sup> In this six-to-three decision, the Supreme Court relied on equal access reasoning to

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<sup>62</sup> See *id.* at 772-83 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in judgment); *id.* at 783-96 (Souter, J., joined by O'Connor and Breyer, JJ., concurring in part and concurring in judgment); *id.* at 797-816 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting). By contrast, a four-Justice plurality opinion argued that private religious speech can never be denied equal access to a public forum in order to avoid an Establishment Clause violation predicated on perceived governmental endorsement. See *id.* at 763-70 (plurality opinion).

<sup>63</sup> See *id.* at 801-02 (Stevens, J., dissenting); *id.* at 817 (Ginsburg, J., dissenting).

<sup>64</sup> *Id.* at 811 (Stevens, J., dissenting); cf. *id.* (noting that *Widmar* and *Lamb's Chapel* did not involve a religious group seeking to use "the roof of a public building for an obviously religious ceremony, where many onlookers might witness that ceremony and connect it to the State").

<sup>65</sup> In fact, as Justice Stevens observed, it was more narrowly sectarian than that, because not all Christian denominations use the Latin cross as a symbol. See *id.* at 798 n.3; cf. *id.* ("[T]he more sectarian the display, the closer it is to the original targets of the [establishment] clause, so the more strictly is the clause applied." (quoting *ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986))).

<sup>66</sup> 533 U.S. 98 (2001).

permit an evangelical Christian group to use a public school building for weekly after-school meetings for elementary students, held under the direction of adult Christian leaders.<sup>67</sup> At these meetings the children would sing songs, hear Bible lessons, memorize scripture, and pray. Through these various activities, the leaders encouraged the children to accept Jesus Christ as their Lord and Savior, saving them from sin and giving them eternal life.<sup>68</sup> The Court recognized a Free Speech Clause right to equal access and found no Establishment Clause violation, citing *Widmar* and *Lamb's Chapel*.<sup>69</sup> But this case was not as easy as those.

Unlike in *Lamb's Chapel*, here the public school meetings targeted students, and, unlike in *Widmar*, the students were young and impressionable children (ages six to twelve), not college-age adults.<sup>70</sup> As the majority noted, children could not participate without parental permission,<sup>71</sup> but this requirement did not entirely eliminate the risk of coercion. With the meetings taking place at school and just after the close of the official school day, student participation was encouraged, to some degree, by the governmental policy of compulsory school attendance. The location<sup>72</sup> and timing of the meetings also enhanced the social force of peer pressure, which was likely to influence some students to seek—and perhaps obtain—parental permission to attend. In fact, attendance at the meetings increased three-fold when they were moved from a community church to the school.<sup>73</sup> Although the government's involvement was limited to the provision of meeting space under a neutral policy of equal access, the particular circumstances here, including the location and timing of the meetings, suggested that the government was doing more than merely facilitating purely private expression. In addition, the expression was specifically Christian and more narrowly evangelical, and it included not only religious instruction but also proselytizing and prayer. Under the multivariable approach, this case was not so easy because the government arguably bore partial responsibility for the religious expression; because its involvement helped create a modest but meaningful risk of coercion; and because the religious expression was both worshipful<sup>74</sup> and sectarian in nature.

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<sup>67</sup> *Id.* at 103, 120.

<sup>68</sup> *See id.* at 137-38 (Souter, J., dissenting); *id.* at 112 n.4 (majority opinion) (accepting the accuracy of Justice Souter's description of the meetings).

<sup>69</sup> *See id.* at 113 (majority opinion).

<sup>70</sup> *See id.* at 103.

<sup>71</sup> *See id.* at 115.

<sup>72</sup> Although the group did not meet in an elementary classroom, it did meet in a room next to the regular third- and fourth-grade classrooms. *See id.* at 118; *id.* at 144 (Souter, J., dissenting).

<sup>73</sup> *See id.* at 144 (Souter, J., dissenting).

<sup>74</sup> The expression was worshipful even if it included other elements as well, including the teaching of morals and character. *See id.* at 108-12 (majority opinion).

### C. *Hard Cases*

I turn next to consider two examples of hard cases: the Ten Commandments dispute in *Van Orden v. Perry*<sup>75</sup> and the unresolved issue of whether public schools can ask school children to recite the Pledge of Allegiance, complete with its “under God” language. As with the not-so-easy cases I have discussed, these cases might not be considered difficult under the Supreme Court’s prevailing constitutional doctrine. In both situations, by every indication, the government is promoting religion in violation of the *Lemon* and endorsement tests. As a result, the Supreme Court’s existing doctrine—putting aside the Court’s fractured decision in *Van Orden* itself—would strongly suggest an Establishment Clause violation in each case. Under the multivariable approach, by contrast, the cases are difficult. To be sure, the government is promoting religious expression, thereby impairing Establishment Clause values to a significant degree. But other constitutional values are also in play, and the four constitutional variables I have identified suggest that the Establishment Clause argument in each case might—or might not—properly be rejected.

#### 1. *Van Orden v. Perry*

In *Van Orden*, the Supreme Court confronted an Establishment Clause challenge to a Ten Commandments monument on the outdoor grounds of the Texas State Capitol, where it had been placed some four decades earlier, in 1961.<sup>76</sup> At that time, a private (and primarily secular) group, the Fraternal Order of Eagles, had donated the monument to the State as part of a campaign against juvenile delinquency.<sup>77</sup> The granite monolith, six feet in height, was inscribed with the text of the Ten Commandments, with language drawn from the King James Bible and reflecting a largely Protestant interpretation of the Commandments.<sup>78</sup> At the bottom was the following inscription: “Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas 1961.”<sup>79</sup> It was one of seventeen monuments and twenty-one historical markers on the state-house grounds, which amounted to a large park, encompassing twenty-two acres.<sup>80</sup>

In a fractured, five-to-four decision, the Court narrowly rejected the Establishment Clause challenge. Writing for a four-Justice plurality, Chief Justice Rehnquist argued that this “passive” religious display should not be subject to

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<sup>75</sup> 545 U.S. 677 (2005).

<sup>76</sup> *Id.* at 681-82 (plurality opinion).

<sup>77</sup> *See id.* at 682; *id.* at 701-02 (Breyer, J., concurring in judgment).

<sup>78</sup> *See id.* at 681 (plurality opinion); *id.* at 707-08, 717-19, 735 (Stevens, J., dissenting).

<sup>79</sup> *Id.* at 681-82 (plurality opinion).

<sup>80</sup> *See id.* at 681.

the *Lemon* test<sup>81</sup> but instead should be evaluated in light of American history, which, he contended, has consistently included and permitted official acknowledgement of the role of religion in American life.<sup>82</sup> Viewed in this light, the Texas monument was a permissible acknowledgement of the Ten Commandments' religious as well as secular significance.<sup>83</sup> Casting the deciding vote in *Van Orden* was Justice Breyer. Concurring only in the judgment, Breyer did not accept the plurality's lenient approach as a general proposition. Even so, calling this a "borderline" case demanding the exercise of "legal judgment,"<sup>84</sup> he agreed that the Establishment Clause was not violated in the particular circumstances at hand. Among other factors, he noted the non-sacred setting in which the monument was displayed and the monument's forty-year history without previous legal challenge.<sup>85</sup>

Under the multivariable approach, at least, *Van Orden* was indeed a "borderline" case. In describing the Texas monument as a "passive" display, the plurality implicitly addressed the first variable, that of governmental coercion or aggressiveness. Given its location in a large park-like setting, complete with other monuments and historical markers, the Ten Commandments monument did not aggressively or coercively "impose" religion—certainly not, for example, as compared to a display of the Commandments in the inherently coercive setting of a public school classroom.<sup>86</sup> Likewise, the monument's particular setting arguably made it less aggressive a promotion of religion than the privately erected Latin cross in *Capitol Square*, which stood directly in front of the Ohio State Capitol, facing a public street and readily visible to passing motorists and pedestrians.<sup>87</sup> Conversely, the Texas monument was not as passive as the government's provision of meeting rooms in the equal access cases of *Widmar* and *Lamb's Chapel*.<sup>88</sup> Nonetheless, on a continuum running from pas-

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<sup>81</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>82</sup> See *Van Orden*, 545 U.S. at 686-90 (plurality opinion).

<sup>83</sup> See *id.* at 691-92.

<sup>84</sup> *Id.* at 700 (Breyer, J., concurring in judgment).

<sup>85</sup> See *id.* at 702-03. In a companion case, Justice Breyer joined the four dissenters in *Van Orden*, forming a five-Justice majority to invalidate displays of the Ten Commandments that had been recently posted by local officials in the hallways of Kentucky courthouses. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005). I am focusing on *Van Orden* rather than *McCreary County* because, under the multivariable approach, *Van Orden* is a harder and more interesting case.

<sup>86</sup> The plurality thus distinguished *Stone v. Graham*, 449 U.S. 39 (1980), which had invalidated a state law requiring public schools to post the Ten Commandments in their classrooms. See *Van Orden*, 545 U.S. at 690-91 (plurality opinion).

<sup>87</sup> See *supra* notes 60-65 and accompanying text.

<sup>88</sup> See *supra* notes 40-43 and accompanying text.

sive acknowledgment to aggressive or coercive imposition, the Texas monument fell relatively close to the passive endpoint.<sup>89</sup>

The second variable requires consideration of the nature and specificity of the religious expression. The Ten Commandments derive from a particular religious tradition and include specific theological declarations and prescriptions. As a result, the expression is far more threatening to Establishment Clause values than more general affirmations such as "In God We Trust" or "one Nation under God." The particular text of the Texas monument, moreover, embodied a particular and largely Protestant interpretation of the Ten Commandments, one that implicitly rejected competing interpretations, including Jewish and Roman Catholic views.<sup>90</sup> For Justice Stevens in dissent, this was an impermissible sectarian preference, with the government improperly resolving a theological dispute.<sup>91</sup> Justice Stevens' view is plausible, but Justice Scalia offered a plausible rejoinder (in a companion case decided alongside *Van Orden*), suggesting that the government's mere acceptance or display of a particular version of the Ten Commandments ordinarily should not be understood to address, much less resolve, this significant but obscure sectarian controversy.<sup>92</sup> In their more generic sense, Scalia argued, the Ten Commandments are common not only to Judaism and all forms of Christianity, but also to Islam.<sup>93</sup> For Scalia, this rendered the Texas monument sufficiently nonsectarian to satisfy his lenient approach to the Establishment Clause, which would forthrightly permit governmental expression favoring monotheistic religion.<sup>94</sup>

Without accepting Scalia's general approach, one might agree that the Ten Commandments, at least in the American religious setting, are relatively nonsectarian.<sup>95</sup> Likewise, although the Commandments address worshipful behavior, they do not themselves constitute worshipful expression in the nature of a prayer or religious ritual. The Texas monument thus promoted religious expression that was relatively specific theologically but at the same time arguably nonsectarian, as well as non-worshipful. If the second variable is understood to

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<sup>89</sup> But cf. Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1016 (2005) (contending that "there is no such thing as a 'passive' religious object or symbol").

<sup>90</sup> For an elaboration of the differences in competing versions of the Ten Commandments, see Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1481-1500 (2005).

<sup>91</sup> See *Van Orden*, 545 U.S. at 717-19, 735 (Stevens, J., dissenting).

<sup>92</sup> See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 909 n.12 (2005) (Scalia, J., dissenting); see also *id.* at 894 n.4 (noting that "[t]he Establishment Clause would prohibit . . . governmental endorsement of a particular version of the Decalogue as authoritative").

<sup>93</sup> See *id.* at 894.

<sup>94</sup> See *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

<sup>95</sup> As Professor Smith has observed, "'nonsectarian' is of necessity a term of degree," and "[t]he degree to which a measure is 'nonsectarian' will vary with context," including "time and place." Smith, *supra* note 25, at 8.

create a spectrum of religious expression, the Texas monument was perhaps somewhere in the middle.

The third variable, tradition, can be understood at varying levels of generality. According to Justice Scalia, the government is broadly permitted to favor monotheism symbolically because it has done so historically through various practices, including legislative prayer, presidential Thanksgiving proclamations, and the Supreme Court's opening cry, "God save the United States and this Honorable Court."<sup>96</sup> A more focused consideration of tradition looks more narrowly at the specific practice in question—here, governmental displays of the Ten Commandments—or, more narrowly still, at the particular embodiment of that practice in the case at hand. Justice Breyer's decisive opinion in *Van Orden* can be read to reflect a relatively focused consideration of tradition. Thus, he emphasized the forty-year history of the Texas monument under review and also implied, somewhat more broadly, that Ten Commandments monuments of this vintage should be upheld but that newly erected monuments might properly meet a different fate.<sup>97</sup> As Breyer's opinion suggested, older monuments are less likely to offend and affront religious minorities and nonbelievers, and, at the same time, for the Court to order them removed might very well cause more harm to political cohesiveness than it would eliminate, a result at odds with the Establishment Clause value of religious inclusiveness.<sup>98</sup> The variable of tradition thus offers some support for the Court's decision in *Van Orden*—in part because of the general tradition that Scalia describes, but especially on the basis of Breyer's more focused historical inquiry.<sup>99</sup>

Turning to the final variable, the Texas monument, although donated by a private group, was placed on the statehouse grounds as the result of governmental action and was then maintained in that location for decades, making the government by far the dominant sponsor. Even so, as Justice Breyer recognized, the private donation—prominently acknowledged on the monument itself—was not irrelevant. Notably, the private group was primarily secular, and it had acted in consultation with a multi-faith committee in an attempt to develop a nonsectarian version of the Commandments.<sup>100</sup> The group did not entirely succeed in this effort,<sup>101</sup> but it was the group, not the government, that

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<sup>96</sup> See *McCreary County*, 545 U.S. at 885-900 (Scalia, J., dissenting).

<sup>97</sup> See *Van Orden*, 545 U.S. at 702-04 (Breyer, J., concurring in judgment).

<sup>98</sup> See *id.*

<sup>99</sup> According to Gedicks and Hendrix, recently erected Ten Commandments displays, as compared to older ones, are more likely to reflect a sectarian, conservative Christian message. See Gedicks & Hendrix, *supra* note 29, at 288-304. If so, then the third variable, that of tradition, may indirectly bear on the second, relating to the nature and specificity of the religious expression. In particular, it may bear on the sectarian-nonsectarian dimension of the second variable, tending to reinforce the view that traditional displays are relatively less problematic.

<sup>100</sup> See *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in judgment).

<sup>101</sup> See *id.* at 717-18 (Stevens, J., dissenting).

chose the text, lending support to the view that the government was not taking sides in a sectarian dispute.

Under this analysis, *Van Orden* was a hard case. Despite its private origin, the Texas monument was governmentally sponsored. And although the Ten Commandments have secular significance, they are fundamentally religious. The monument therefore was promoting religion and impairing Establishment Clause values. Beyond that, the monument's specific text could be read to reflect a sectarian preference favoring a particular Protestant view. Conversely, one could reasonably argue that the government's acceptance and continuing display of the monument should not be understood in sectarian terms and should instead be understood to reflect a more generic, and relatively nonsectarian, affirmation of the Commandments. In any event, the monument was a passive display, not imposing religion in a coercive or confrontational manner, and it was supported by the force of both general and more specific historical tradition.

## 2. The Pledge of Allegiance Controversy

In *Elk Grove Unified School District v. Newdow*,<sup>102</sup> the Supreme Court confronted—but avoided—an Establishment Clause challenge to the “under God” language in the Pledge of Allegiance, which reads in full as follows: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”<sup>103</sup> The decision under review was a two-to-one ruling by the Ninth Circuit Court of Appeals. The Supreme Court previously had approved the Pledge in dicta,<sup>104</sup> but the Ninth Circuit found an Establishment Clause violation. In its initial opinion, the Ninth Circuit ruled that the congressionally adopted “under God” language, added to the Pledge in 1954, violated the *Lemon* and endorsement tests.<sup>105</sup> The court's decision triggered a public outcry, as well as petitions for rehearing en banc. With nine judges dissenting, the Ninth Circuit denied rehearing en banc, but the original three-judge panel issued an

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<sup>102</sup> 542 U.S. 1 (2004).

<sup>103</sup> 4 U.S.C. § 4 (2000); see *Newdow*, 542 U.S. at 7.

I have discussed the Pledge of Allegiance controversy in an earlier article. See Daniel O. Conkle, *Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, But Not Indifference*, 13 IND. J. GLOBAL LEGAL STUD. 417, 435-38 (2006). But my analysis here is distinctive. I suggested in the earlier article (and continue to believe) that conventional Establishment Clause doctrine, as embodied in the *Lemon* and endorsement tests, is subject to an implicit exception for certain governmental expression that promotes or endorses religion, but only when the expression is noncoercive, nonsectarian, and embedded within (or at least in harmony with) longstanding historical tradition. See *id.* at 432-40. Here, by contrast, I am exploring an alternative, multivariable approach—an approach that would not be based upon rule-like tests or rule-like exceptions.

<sup>104</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

<sup>105</sup> See *Newdow v. U.S. Cong.*, 292 F.3d 597, 605-12 (9th Cir. 2002), amended by, 328 F.3d 466 (2003), *rev'd sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

amended opinion that narrowed the court's holding to the public school setting.<sup>106</sup> In this second opinion, the court avoided a general ruling concerning the "under God" language. Instead, citing concerns about the coercion of impressionable children, the court ruled only that public schools could not sponsor recitations of the Pledge that include this religious language.<sup>107</sup>

In the Supreme Court, only eight Justices participated, Justice Scalia having recused himself.<sup>108</sup> By a vote of five to three, the Court avoided the Establishment Clause issue by reversing the Ninth Circuit on procedural grounds. The majority opinion concluded that the Establishment Clause issue was not justiciable because the challenger (a parent with limited and disputed custodial rights) lacked "prudential standing" to bring the case in federal court.<sup>109</sup> The majority's justiciability ruling was plausible but novel, leading the three Justices who dissented on this point—Chief Justice Rehnquist, joined by Justices O'Connor and Thomas—to suggest that the majority was improperly evading the Establishment Clause issue.<sup>110</sup>

Although each offered different reasoning, these three Justices would have reversed the Ninth Circuit on the merits by declaring that the "under God" language does not violate the Establishment Clause, not even in the public school setting. Chief Justice Rehnquist's opinion was ambiguous, but he suggested that time-honored traditions such as the Pledge should not be subject to the Court's usual doctrinal tests. Instead, he cited a range of historical examples as support for the proposition that "our national culture allows public recognition of our Nation's religious history and character."<sup>111</sup> Justice O'Connor joined Rehnquist's opinion, but she also wrote separately. Remarkably enough, she contended that the "under God" language—understood as a historical and descriptive reference—does not endorse religion and therefore satisfies the endorsement test, eliminating the need for a doctrinal modification.<sup>112</sup> Despite her disclaimer, however, O'Connor's opinion could be read to support a doctrinal exception for "ceremonial deism" meeting four conditions, each of which she found satisfied by the "under God" reference in the Pledge: history and ubiquity, absence of worship or prayer, absence of reference to any particular religion, and minimal religious content.<sup>113</sup> In his own separate opinion, Justice Thomas made no pretense of applying the Court's conventional doctrine. To the contrary, he argued that the Court's conventional doctrine would clearly require invalidation, but he contended that this doctrine should be substantially modi-

<sup>106</sup> *Newdow v. U.S. Cong.*, 328 F.3d 466.

<sup>107</sup> *See id.* at 485-90.

<sup>108</sup> *See Newdow*, 542 U.S. at 18.

<sup>109</sup> *Id.* at 11-18.

<sup>110</sup> *See id.* at 18-25 (Rehnquist, C.J., concurring in judgment).

<sup>111</sup> *Id.* at 30; *see id.* at 25-30.

<sup>112</sup> *See id.* at 33-34, 36-37 (O'Connor, J., concurring in judgment).

<sup>113</sup> *See id.* at 37-45.



fied, not only for historical practices but more generally.<sup>114</sup> In light of the Court's justiciability ruling and the divergent reasoning of the Justices who would have reached the merits, the Establishment Clause question remains open.<sup>115</sup>

The Supreme Court's apparent reluctance to decide this issue is not surprising, because the proper resolution is not clear. Under the Court's conventional Establishment Clause tests, the Ninth Circuit's opinions were perfectly reasonable, including not only the court's second opinion, but also its first. Justice O'Connor to the contrary notwithstanding, for the government to declare—and to encourage its citizens to declare—that the United States is a nation “under God” surely is an action that promotes and endorses religion in violation of the *Lemon* and endorsement tests.<sup>116</sup> But those tests do not capture the full range of relevant constitutional values in this context, as O'Connor implicitly recognized in discussing the various factors that she did. The multivariable approach brings the additional values more openly into view, and it helps explain why this issue, in reality, is difficult indeed.

Without doubt, the governmental action in question—asking school children to recite the Pledge of Allegiance in the public school setting—is both aggressive and coercive. In *West Virginia State Board of Education v. Barnette*,<sup>117</sup> the Supreme Court squarely ruled that public schools cannot directly compel objecting students to recite the Pledge.<sup>118</sup> *Barnette* predated the Pledge's “under God” language, but the Establishment Clause, if anything, now provides additional support for the Court's holding. Thus, a student who objects to the Pledge because of its “under God” language certainly is free to opt out of the Pledge entirely, or, if the student prefers, he or she is free to participate in the Pledge without reciting that particular phrase. But under the Establishment Clause, this freedom from direct compulsion might not be enough. In its school prayer cases, the Court has not approved school-sponsored prayer even when the prayer is formally voluntary. Instead, the Court has been concerned about the indirect and subtle coercion, including peer pressure, that can arise when teachers or other school officials ask students to participate in a group exer-

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<sup>114</sup> See *id.* at 45-54 (Thomas, J., concurring in judgment).

<sup>115</sup> In the aftermath of the Supreme Court's decision, lower courts have reached conflicting results in addressing this issue. Compare *Myers v. Loudon County Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005) (upholding daily recitation of the Pledge in public schools), with *Newdow v. Congress*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005) (relying on prior Ninth Circuit ruling in *Newdow* to conclude, in renewed litigation, that this practice violates the Establishment Clause).

<sup>116</sup> See Steven G. Gey, “Under God,” *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1872-97 (2003). But cf. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2003) (suggesting, with caveats, that “under God” might be defensible under the Establishment Clause as the statement of a religious rationale for limited government and human rights).

<sup>117</sup> 319 U.S. 624 (1943).

<sup>118</sup> See *id.* at 642.

cise.<sup>119</sup> Those same concerns are present when school children are asked to recite the Pledge. The first variable, without more, suggests a serious Establishment Clause problem.<sup>120</sup>

The second variable, however, points in the other direction, and it tends to mitigate the concerns about coercion. As Chief Justice Rehnquist and Justice O'Connor both emphasized in *Newdow*, the Pledge of Allegiance is not a prayer or religious exercise. It is a patriotic exercise that includes a brief and general religious reference or declaration.<sup>121</sup> As a result, the indirect coercion that is at work is not inducing students to engage in worship, the core concern of religious voluntarism, nor is it inducing them to adopt a specific theological viewpoint. The religious expression in the Pledge is non-worshipful, it is as nonsectarian as any theistic reference can be, and—unlike the Ten Commandments—the religious affirmation is exceedingly general in nature. Moreover, because the religious reference is so brief, students can meaningfully participate in the Pledge, if they choose, without reciting the religious language.<sup>122</sup> These factors do not by any means eliminate the problem of coercion, but they do make it relatively less serious.

The third variable, tradition, offers additional support for upholding the Pledge. The “under God” language dates back to 1954, giving it a substantial history of more than fifty years. To be sure, other historical traditions, such as legislative prayer, are much older, and, indeed, the tradition of the Pledge is not unambiguously religious. The Pledge was first conceived in 1892, without the contested language, and its history as an entirely secular statement therefore is longer than its history with the “under God” addition of 1954.<sup>123</sup> Even so, the post-1954 tradition is by now an embedded feature of the American social fabric. As Justice O'Connor noted in *Newdow*, this tradition is supported not only by its span of years but also by its prominence and “ubiquity”:

Fifty years have passed since the words “under God” were added, a span of time that is not inconsiderable given the relative youth of our Nation. In that time, the Pledge has become, alongside the singing of The Star-Spangled Banner, our most routine ceremonial act of patriotism; countless schoolchildren recite it daily, and their religious heterogeneity reflects that of the Nation as a whole. As a result, the Pledge and the context in

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<sup>119</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 590-99 (1992).

<sup>120</sup> See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 227-31 (2004).

<sup>121</sup> See *Newdow*, 542 U.S. at 31 (Rehnquist, C.J., concurring in judgment); *id.* at 39-43 (O'Connor, J., concurring in judgment).

<sup>122</sup> See *id.* at 43 (O'Connor, J., concurring in judgment).

<sup>123</sup> See *id.* at 6-7 (majority opinion).

which it is employed are familiar and nearly inseparable in the public mind.<sup>124</sup>

Tradition is a constitutional value in its own right, and the traditional stature of the Pledge therefore warrants a measure of respect. Furthermore, the traditional nature of the “under God” language—part of the status quo for over half a century—arguably moderates, to a degree, the message of disrespect and exclusion it otherwise might send to dissenters. Conversely, judicial invalidation itself might send a powerful message of exclusion to those citizens who embrace this language, in part precisely because of its traditional stature. As in *Van Orden*, invalidation therefore might hinder—not promote—the value of religious inclusiveness.

The final variable, by contrast, like the first, points toward an Establishment Clause violation. There is an element of private expression when school children elect to recite the Pledge, but they are not speaking at their own initiative, and the language is not their own. Rather, they are agreeing to recite a Pledge that was prescribed and ordained by the United States Congress and that is being orchestrated by public school officials. Plainly, this is governmentally sponsored expression, and the government is responsible for its content.

This is a hard case. The four variables—and the underlying constitutional values they reflect—point in both directions. As a matter of Breyer-esque legal judgment, the proper result requires balancing, and the result of that balancing depends upon the relative importance of the competing values that are at stake. The religious expression is governmentally crafted and sponsored, and, in the public school setting, the risk of indirect coercion is high. But the expression is part of a longstanding and “ubiquitous” tradition, and the religious language is non-worshipful, nonsectarian, and extremely brief and general. As a result, it might be enough that students cannot be directly compelled to recite either the “under God” language or the Pledge in general. But then again, this might not be enough. The case is close and difficult.

#### CONCLUSION

In this Essay, I have explored an alternative approach for resolving Establishment Clause questions concerning religious expression in governmental settings. Designed to reflect and mediate the various and competing constitutional values that press for recognition, this approach would jettison the *Lemon* and endorsement tests and, more broadly, would forego any attempt to formulate a categorical or bright-line test or rule. Instead, Establishment Clause challenges in this context would be resolved under a multivariable standard requiring the Supreme Court to exercise what Justice Breyer calls “legal judgment.”<sup>125</sup>

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<sup>124</sup> *Id.* at 38 (O'Connor, J., concurring in judgment).

<sup>125</sup> *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment).

More specifically, the Court would consider and weigh four constitutional variables: the degree to which the religious expression is “imposed” in a coercive or aggressive manner; the worshipful or non-worshipful nature of the expression and the degree to which its message is sectarian and specific rather than nonsectarian and general; the extent to which the expression is supported by tradition; and the degree to which it is a product of governmental, as opposed to private, crafting and sponsorship. Under this approach, as I have explained, some cases are easy, some are not so easy, and others are hard.

In his commentary on this Essay,<sup>126</sup> Professor William P. Marshall suggests that there is an additional constitutional variable in this context, beyond the four that I have identified. Noting the “secular purpose” prong of the *Lemon* test,<sup>127</sup> Professor Marshall contends that when the government acts to address or promote religious expression, certain purposes are more problematic than others, and that, accordingly, the Court should consider, as an additional variable, the precise governmental purpose in the case at hand.<sup>128</sup> Professor Marshall has a point, but oftentimes the government’s purpose is disputed, unclear, or multifaceted. Moreover, I believe that the four variables I have identified can usefully serve as substitutes or proxies for an independent examination of governmental purpose. In other words, I think the four variables, taken together, can be seen to measure or identify the government’s purpose, objectively understood, permitting the Court to avoid what might be a difficult and potentially intrusive inquiry into non-obvious, underlying governmental motives or objectives.<sup>129</sup> As a result, I am inclined to resist adding governmental purpose as an additional, separate variable in every case. At the same time, I am open to the possibility that there may be exceptional situations requiring an independent consideration of the government’s purpose. Beyond this, other constitutional

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<sup>126</sup> William P. Marshall, William Rand Kenan, Jr., Professor of Law, University of North Carolina, Comments at the West Virginia College of Law and American Constitution Society for Law and Policy Symposium: *The Religion Clauses in the 21st Century* (April 13, 2007) (on file with WEST VIRGINIA LAW REVIEW) [hereinafter Marshall, Symposium].

<sup>127</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>128</sup> See Marshall, Symposium, *supra* note 126.

<sup>129</sup> The Supreme Court itself has recently called for an objective determination of governmental purpose. Thus, in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005), the Court reaffirmed the secular purpose prong of *Lemon*, but it also clarified or modified earlier doctrine by insisting that the search should be for the government’s objective or “ostensible” purpose, not its subjective motivation:

[I]n Establishment Clause analysis, . . . an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts. The eyes that look to purpose belong to an “objective observer,” one who takes account of the traditional external signs that show up in the “text, legislative history, and implementation of the statute,” or comparable official act.

*Id.* at 862 (citations omitted); see *id.* at 860 (indicating that the touchstone under the first prong of *Lemon* is the government’s “ostensible and predominant purpose”); *id.* at 863 (stating that underlying motivation is irrelevant if it is hidden so well that the objective observer “cannot see it”).

variables may arise in specific governmental settings. For example, the permissible scope of religious expression by military chaplains may turn in part on the degree to which their expression serves to accommodate the free exercise interests of other military personnel.<sup>130</sup>

In all events, this Essay is exploratory in nature. I am not entirely convinced that a multivariable standard would be desirable in this context. Brighter-line constitutional tests or rules have benefits. Among other attributes, they constrain judicial discretion, and they are easier to understand and apply, points that might have special salience for lower courts and for governmental officials attempting to comply with the Supreme Court's mandates. But brighter-line approaches also entail serious costs. In particular, any clear-cut test or rule almost inevitably precludes a full and open consideration of all the relevant constitutional values. In addressing religious expression in governmental settings, I have argued that at least seven constitutional values are at stake: religious voluntarism, respect for religious identity, religious inclusiveness, religious independence, religious equality, tradition, and religious free speech. A multivariable standard can give these values their due. A clear-cut test or rule cannot, leading instead to the exclusion—or concealment—of relevant decisionmaking criteria. Perhaps a clear-cut approach is justified nonetheless, but perhaps not. Ironically, this is a jurisprudential choice that itself is not clear-cut.<sup>131</sup> As Justice Breyer might say, it is a matter of legal judgment.

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<sup>130</sup> As Professors Ira C. Lupu and Robert W. Tuttle have noted, “the military chaplaincy is a thoroughly positive accommodation. The military may permit service members free time for religious experience, but the chaplaincy also creates the content of such experiences through preaching, worship, religious instruction and pastoral care.” Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 120 (2007); see *id.* at 131-165 (offering a sophisticated analysis of constitutional questions relating to the role of chaplains in conducting faith-group worship, offering prayer at official ceremonies, and providing pastoral care).

<sup>131</sup> See generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-123 (1992) (discussing and evaluating the choice between rules and standards in constitutional adjudication).